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ABSTRACT

Grievance procedures must be fast and fair to satisfy everyone and to disrupt the normal workflow as little as possible. The following factors help make for effective procedures: (1) binding arbitration, because it is orderly and unbiased; (2) contributions to contract language by the contract administrators; (3) absolute honesty about contract provisions during bargaining; (4) a negotiating committee that can agree on the meaning of contract language; (5) a "zipper clause" limiting grievances to matters covered in the contract; (6) avoidance of contract clauses permitting grievances based on violations of "past practice"; and (7) good faith among all parties. When grievances do occur, management should review the contract in the context of bargaining history. All grievances should be treated as though bound for arbitration, though management should avoid arbitration unless certain of winning or unless going public could prove harmful. Management should limit the scope of grievance and retain a lawyer specializing in education and labor law. The school board should not be involved in the grievance process. Management's sincere desire to be fair and responsive to employees will help limit grievances to legitimate concerns and reduce union use of the grievance procedure as a propaganda tool. (PGD)

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A SUPERINTENDENT'S PERSPECTIVE OF THE GRIEVANCE PROCESS

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Preparation

Unfortunately, to many engaged in the management of schools there is something negative, unpleasant and undesirable about the grievance process. To many board members and superintendents it is viewed as a flagrant intrusion into the rights of management and ought not to exist. In cases where it does exist, the problem becomes intolerable if the process culminates in arbitration. Then, of course, even arbitration has its levels of onerousness, the most onerous being final and binding.

Contrary to this point of view, there is another opinion, among some shool mamangers, the writer included, which holds that:

1) Grievance procedures are an essential element in any collective bargaining agreement;

2) Any agreement that does not contain an arbitration clause is not really an agreement at all; and

3) Any arbitration that is not final and binding is not really arbitration.

Preparing for arbitration begins long before the grievance is filed. Preparing for the grievance begins with planning for the bargaining process itself. It culminates in the careful training of those principals and other middle management personnel who are charged with the responsibility of administering the contract once it has been negotiated.

More contract violations occur at the building level than at any other single place. Principals, understandably, and necessarily, are very jealous of their power and autonomy in running their buildings. They expect to be the boss. They should be the boss. The teachers and others expect them to be the boss. This is especially

true when there is a problem. Teachers expect the principal to be all things to all people: quell the riot, eliminate the discipline problems from their class-rooms, have all of their supplies and equipment at their disposal when they need them, give them a day off to take aunt Martha to have her eyes examined, and loan them $10 until payday. But let the principal say, "No", to even the most outrageous request and where do they go? To the building representative and commence the grievance process.

Knowing all that, why would anyone advocate a grievance process culminating in binding arbitration? Because it is the only orderly process available for peacefully adjudicating disagreements that arise out of the administration of the contract. There has to be some way to get the disgruntled employee back to work and peace restored to the rank and file.

Anyone who has been in a school building while a grievance is in process knows that very little education goes on during that sometimes lengthy passage of time. Therefore, the process must be fast and fair and everyone must be satisfied that justice has been done when the process is completed. Big order? Not necessarily. Not with careful pre-planning and thorough training.

Draftsmanship and the Team

The pre-planning begins with the drafting of the language of the contract. Who should draft the language? The people who are going to administer it. If the language affects the operation of a building, the principals have got to be there when the language is drawn and they must approve, or at least understand, any compromises reached during negotiations.

When the principals are involved in the writing of the contract, they have much less trouble administering that part of the contract, they are much less likely to have disputes arise, they are much better able to explain and defend their position with regard to the issues and are much better prepared to respond to the grievance, if it gets to that point. If there is doubt, they should also have the good sense to call someone else (usually the district contract negotiator or personnel officer) for advice before they respond, so that they're not faced with the problem of losing face when the grievance decision at their level is over-turned.

Preparation for grievances also begins with absolute honesty at the bargaining table. If there is any confusion or misunderstanding about language, it must be clarified before the contract is signed. There is no

place in negotiations for being "cute", that is, allowing the union to believe they have agreed to one thing when management is convinced that the language means something else.

The most important elements in preparation for grievances are formation of the negotiating committee and draftsmanship. The two are interconnected, but the one, draftsmanship, is a technical skill best left to an attorney or professional negotiator (subject to an attorney's final approval) but never left to him or her alone. The draftsmanship and the substance are both the ultimate responsibility of the committee. The committee is the heart of the process and the key to successful grievance processing. The agreement of the members of the committee as to language is imperative in the process of bargaining. Their recollection of precisely what was said during negotiations may be, and frequently is, the turning point in arbitration.

One issue which causes more problems than probably any other in grievance processing is "what constitutes a grievance?" It sounds like a simple question. The answer appears obvious, but, is it? Not necessarily.

Zipper Clause

All good negotiators will insist that the contract contain what is called a zipper clause which, in words or substance says:

> All of the agreements and understandings arrived at by the parties are set forth in this agreement, nothing not committed to writing herein, and no understandings other than those precisely described in this agreement shall be considered as part of this agreement, nor shall any such be subject to the grievance and arbitration provisions of this agreement.

That zipper clause is sound until, and only until, it is undermined by the definition of a grievance which says: "A grievance is any alleged violation of any of the terms and conditions of employment set forth in this agreement or any other alleged violation of any other term or condition of employment". (Emphasis supplied)

This is not an isolated example of unwise language. The writer would estimate that easily half of all of the collective bargaining agreements he has ever read contain this seemingly innocuous language. Most arbitrators have held that this definition of a grievance effectively nullifies the strongest zipper clause.

Past Practice

Another warning involves a concept known as "past practice". It appears, predominantly, in two places: in arbitrators' awards, and in grievance and arbitration hearings. Almost without exception, the concept is raised by the union, in behalf of the grievant employee. The other place it appears is in the contract, itself. When past practice is institutionalized in a collective bargaining agreement the result is a contract which not only bestows on the employees all of the concessions contained in the agreement but everything else the employer has ever done for or in behalf of the employees back to the beginning of time.

Past practice is the neutralizer of the management perogative clause. It renders management perogatives totally impotent.

What the past practice clause, in words or substance says is that the district agrees not to diminish, in any way, any term or condition of employment which was in existence prior to the negotiation of the agreement. Most people are familiar with the expression "everything but the kitchen sink." Past practice adds the kitchen sink.

Sometimes a contract will have a section brazenly entitled, "PAST PRACTICE". More frequently past practice will be found hidden in the grievance definition in language such as this:

> A grievance is a claim by a teacher or group of teachers in the negotiating unit based upon any event or condition affecting their welfare and/or terms and conditions of employment, including, but not limited to, any claimed violation, misinterpretation, misapplication or inequitable application of law, rules or regulations, having the force and effect of law, this agreement, policies, rules, by-laws, regulations, directions, orders, work rules, procedures, practices or customs of the Board of Education and the administration. [emphasis supplied]

It is part of the union boilerplate. It is amazing how many contracts still contain such past practice provisions. Note the reference to policies, rules and customs of the Board or the administration. This is where the kitchen sink is hidden.

Having noted a warning about defective zipper clauses,

past practice and global definitions of grievances, it is time to turn to legitimate grievances arising out of honest disagreement about the language of the contract. For purposes of this discussion it is assumed that the agreement has been entered into in good faith by both parties.

Good Faith

That immediately raises another issue. Good faith? What does that mean? Volumes have been written on the subject and untold cases (perhaps even thousands) have been litigated on the subject of good (or bad) faith. Definitions abound. The writer's is simple. Good faith means that the parties intended to enter into an agreement, that they did the best job they could to commit their agreements to writing, and that neither party was trying to be cute, that there was no booby trap language intentionally inserted into the agreement to cause premeditated trouble some time in the future, and that there was some semblance of mutual trust and respect among the parties who signed the agreement.

Importance of the Committee

Irrespective of the intent of the parties, no matter how noble the intentions at the time of signing, there <u>will</u> be booby traps. They occur because contracts are negotiated by imperfect creatures. Therefore, their writings will also be imperfect. Therein lies one of the primary sources of disagreement in contract administration. This is why most negotiators advocate grievance procedures for settling differences, peacefully, and why binding arbitration must be the culminating activity when all other efforts at resolving conflict fail.

Another reason for the frequent surfacing of grievances is that the parties to the negotiations often change. It is not uncommon for personnel within the union and within management to have changed so drastically over time that few, if any, of the people who negotiated the agreement are involved in its administration at the top levels. However,the members of the negotiating committees may likely still be around. The recollections of those team members, even if all of the primary parties are still around, are extremely important. This is also why so much emphasis is placed by professional negotiators on the minutes of bargaining sessions.

Bargaining History

When managers go into a grievance, what do they have to work with?

First, they have the agreement. What does it say on the subject in dispute? What is the precise language? What do other parts of the agreement say on the same subject, either directly by specific reference, or by inference?

Next, there is the bargaining history. How did the provision under dispute come to be in the agreement to begin with? Has it been in the contract for a long time? Has it ever been changed? Why was it changed? Has there been any correspondence between the parties to lend credence to arguments on either side as to the legislative history of the present language?

What was said at the bargaining table when the language was agreed to? Was the language put in the contract to solve a problem? If so, what was the problem at that time that led the parties to put the disputed language into the agreement. This is one of the many places where the recollections of the bargaining committee can be critical.

Arbitration

Perhaps this is a good place to pause and observe that all of this sounds like preparation for arbitration. That is exactly what it is. Every grievance, no matter how petty, should be treated as though it is on its way to arbitration. This is the best way to stay out of arbitration.

CARDINAL RULE: Management should never take a matter to arbitration unless certain of winning.

EXCEPTION: There is one. Occasionally, there may be a grievances which either the union or management considers "political" and on which one or the other of the parties cannot afford to take an open public position. When that happens, the union and management may agree ahead of time that it is in their mutual best interest to go to arbitration so that neither side is tainted with the inevitable outcome. These infrequent situations aside, it is still a very good general rule that a school district should not go to arbitration unless it is certain of the strength of the case and expects to win. A union victory in arbitration usually hurts management many times more than a management victory hurts the union. On the other hand, the district cannot afford to be afraid of arbitration.

Middle management must have the confidence that top management will support its handling of first and second level grievances. If there is good communication bet-

ween middle management and the district's contract adminstrator, few grievances should ever get to arbitration, and those that do, probably should. The secret is proper communication and confidence among the various levels of management.

Limiting the Scope of the Grievance

Upon entering the grievance process, the district should try very hard to limit the scope of the grievance. Hopefully, the grievance procedure in the agreement will require the grievant to identify, precisely, the specific provision of the agreement that management is alleged to have violated. If it is possible to get the union to agree to the forms which will be used in the formal procsessing of grievances, the original grievance complaint papers should require the employee to specify, exactly, the article and sub-paragraphs of the agreement which are alleged to have been violated.

If this cannot be accomplished during the initial processing of the grievance, it must be accomplished during the initial stages of the arbitration hearing.

An arbitrator has a very difficult problem if the litigants cannot agree on the issue they are asking the arbitrator to decide. That is not to say that arbitrators do not, on occasion, give themselves license to go far beyond the scope of the issue as framed by the parties. But, generally speaking, arbitrators are content to accept the limitations agreed upon by the litigants.

Also, generally speaking, the union will attempt to leave the issues as broadly stated as possible; leaving the arbitrator full liberty to explore the full text of the contract to extract what ever esoteric interpretation he or she can from the entire agreement. Therefore, it is imperative that the grievance provisions of the contract limit the jurisdiction of the arbitrator as much as possible. Most arbitrators will live within these limits. For those arbitrators who do not, the gate is open for one of the few bases on which the district may, in court, move to vacate or modify the arbitrator's award, on the grounds that the arbitrator exceeded the authority granted under the collective bargaining agreement.

Authority of the Arbitrator

The arbitrator is a creature of the contract. Without the agreement, the arbitration process does not exist. So any limitations the parties wish to place on the jurisdiction of the arbitrator must be agreed to while

the contract is under negotiation. It is virtually impossible to limit the jurisdiction of the arbitrator after the contract is signed, other than limitations that are set by statute. Unless it can be proved that the arbitrator violated the authority granted by the agreement, the only other defense the district has is to plead violation of public policy as expressed by statute.

Selection of Counsel

This is one of the many reasons why draftsmanship is so important. At the risk of offending some readers a warning is suggested about the selection of counsel. In the collective bargaining process, the attorney is critical. Many school districts have relied on a local attorney, in general practice, to conduct the legal affairs of the district. This is a very dangerous practice. School law has become very intricate and most attorneys do not understand its complexities. This is even more critical in the area of labor law. A district must have a labor law expert advising its negotiators in matters of collective bargaining. Local political and sentimental pressures often lead to selection of the local, small town attorney as counsel to a school district. This has sometimes led to disasterous results because education law is now a specialty in itself and should not be left to the general practitioner. This is even more imparative in matters of school district labor law.

Historic Perspective

A quick examination of the history of grievance procedures in the public sector might add some perspective to this discussion Many people are under the impression that, not only are grievance procedures a creature of the collective bargaining agreement, but that they came into existence at the same time as public sector collective bargaining. This is not true in New York State and in many other states as well.

In most instances formal grievance procedures were a prelude to formal collective bargaining. The statute was enacted in New York State in the late 1950's or early 60's. Formal collective bargaining in New York was not enacted until the Taylor Law was passed in 1967.

The grievance statute in New York required the adoption of a board policy which complied with the statute, had employee support (and, incidentally, it had to apply to all employees, not just teachers) and was acceptable to the Board of Education many of whose members still believed in the "Divine Right of Kings."

"The Divine Right of Kings"

The "Divine Right of Kings" is the mentality which some elected public officials, including some board of education members, bring to office which some psychiatrists have dubbed promotion neurosis. What this term suggests is that, by some strange metamorphosis, the electorate have endowed these legislators with certain uncontrovertable and unmistaken insights into what is best for the rest of the community. They can not be wrong, they ought not to be argued with, what they say is law, to challenge them is sacrilige, and (and here is the point with respect to this discussion) they will do what's best for "their people" (that's what they call their employees). For "their people" to have the timerity to challenge their judgment is tantamount to treason, and shows an extreme lack of gratitude for all that has been done for them, already.

It is really sad that there are some public officials who fail to realize that, when they enter office, they are the same lawyers, the same housewives, the same school teachers, the same engineers that they were before they were elected. They have so very much to learn, but they act as though their election endowed them, instantly and magically, with supreme judgment they did not possess before.

Many school board members, negotiators, superintendents and labor relations experts believe it is "divine right" behavior that is responsible for public sector collective bargaining and grievance procedures. Had public employees been treated properly by their benevolent masters, they would never have felt the need to organize to improve their terms and conditions of employment.

When the grievance procedures were first required in New York, before the Taylor Law was passed, that grievance statute was a bone tossed to the unions by the legislature as a response to demands for collective bargaining rights in the early '60's. Many hoped that, with this concession, collective bargaining demands would be abandoned and that the unions would withdraw. History shows that they did not. The grievance statute was the foot in the door behind which crawled, very shortly, the Taylor Law.

In 1979, at the convention of the National School Boards Association in Anneheim, Hyman Rickover declared: "I am inherently indifferent to the desires of those whose favor is necessary to my advancement. I am, therefore,

very grateful for the availability of objective tests for advancement."

It is well known that the courageous admiral had an incredible ability to aggravate his superiors. He is also a genius. What the good admiral was saying that day was that he did not really care what people thought about him; that he wanted to be judged in terms of his accomplishments, his demonstrated competencies, his achievements. Many superintendents feel the same way. Many board members respect that approach to the top management position. Many expect it. Many demand it.

Role of the Board of Education

Many who believe in management of the school system by the chief school officer feel that the grievance process should not include the Board of Education. The last step before arbitration should be the superintendent. If the matter has not been resolved to the satisfaction of the parties by the superintendent's decision, it should go directly to arbitration, not to the Board of Education.

There are several good reasons to keep the Board out of it but the main one is that the grievance process is part of administration and the Board has no more role in this aspect of administration than any other. It is interesting to observe that few experienced board members disagree in this. It is the new ones, who do not really understand their jobs, who want to hear grievances, sit at the bargaining table and otherwise administer the school district. They do not understand that in so doing they remove accountability from the administration and place it directly on their own shoulders. Very few board members are equipped to administer a school district, and even those who <u>could</u> do it were not elected to do so.

Steps

It matters little how many intermediate steps there are in the grievance process as long as there aren't so many that they effectively strangle the prosess and render it ineffectual. The number of steps will vary, to some extent, with the size of the organization but there is rarely any reason to have more than three steps. Districts with a personnel administrator might have four.

<u>Step 1.</u> Step 1 should be at the level of the immediate supervisor; the person who is usually in the best position to resolve the problem and against whom the grievance has probably been brought in the first place. Step 1 should have an informal and a formal stage. The

grievant and his immediate boss should be required to discuss the problem, orally, face to face. A very high percentage of grievances are resolved at that level if the parties are forced to meet and confer about the problem. The formal part of step 1 is for the employee to commit the grievance to writing, specifying the exact provision of the agreement the supervisor is alleged to have violated.

It is amazing how silly many grievances appear when they are put in writing. "Big issues" frequently evaporate. Unions will argue that forcing the employee to write out the grievance has a dampening effect on the grievance process. In some cases it probably does and should. Management should not be dealing with nonsense. When the superintendent gets a grievance it should be a matter of consequence sufficient to warrant taking the time to hold a hearing and write a decision. If the employee or the supervisor is embarassed to have the matter before the superintendent in writing, then it ought not to be there. They should settle the matter without recourse to the grievance machinery. If they can't find the part of the contract that has been violated, they should not be allowed in the door. A grievance is an alleged violation of the agreement; the process is a creature of the agreement. Grievances, within the collective bargaining context, do not exist without an alleged violation of the agreement.

Step 2a. Step 2a is the middle management step. It could go to the building principal, a supervisor, an assistant superintendent (if the grievance is against the principal); or to the superintendent if the district is small, the grievance is against the principal, for example, and the principal reports directly to the superintendent. This is the situation which prevails in the vast majority of school districts in the United States.

Step 2b. Step 2b is to the personnel administrator. If there is a personnel administrator, whether he or she is an assistant superintendent or a director or a coordinator, the next step should be to that person. Here is where the process can really get sticky if the middle management (stage 2a) hearing officer happens to outrank the personnel administrator. This is why the personnel administrator should always have equal rank or cabinet status (not necessarily the same title) as the highest person in the organization under the superintendent. The personnel administrator is the contract administrator and was the one who supervised the bargaining process when the contract was being negotiated. The personnel administrator should know the contract cold, better than the superintendent, even better than

the attorney who drafted it.

Step 3. Step 3 is the superintendent (unless he has heard it already at step 2.) The superintendent's hearing should be formal, a record of the hearing should be made, the decision should be rendered in writing and should also be formal. All decisions beyond step 1 should be written but, predictably, they will be hastily drawn, in not the best legal form and, frequently without the proper support in law or in the contract. The superintendent's decision is the one that may be going to the arbitrator, assuming the advice to bypass the board is followed, and it should be written with great care. The more carefully it is written, the less likely it is to be appealed.

The Right to Grieve

Something needs to be said about the right to grieve. If there are people on the management team who do not believe in the right to grieve, even after it has been agreed to, the district has a real problem. The right to grieve is inherent in the process. It is imperative that all members of the management team understand this and believe it. It is also imperative that the management team be able to accept reversal on a grievance without taking it personally and without losing face. This takes professional people, but if a member of the team cannot accept reversal, that person should be neutralized in the grievance process. When the employee is right, someone in management has got to say so, remedy the problem, and get on with the business of running the school district. When management has this attitude few grievances without merit get to arbitration.

Good Managers Talk to Eachother

Good management teams talk to each other all the time. When this happens, grievances get the attention of the full team from the beginning. If the first level supervisor keeps his or her superiors informed, there is not so much likelihood that a non-contract matter will begin to thread its way through the process.

One of the favorite tactics of some union leaders is to try to accomplish through the grievance process what the union was not able to achieve through collective bargaining. Management must always be on the alert for this strategy. This is the reason for the caveat, if they can't cite the part of the contract which they allege has been violated, the issue should not be heard as a grievance.

The Open Door

It should not be heard as a grievance, but it should be heard. One of the most serious mistakes made by management, and by many employees, is the in assumption that, because there is a grievance procedure, employees and managers can no longer talk to each other. That's nonsense. Nonsense which is heavily fertilized by some union leaders. Unions like grievances. Grievances give the union visibility, especially in non negotiating years under multiple year agreements. They want their unit members to believe that they must utilize the grievance process whenever they want to talk to management.

All employees should be disabused of this notion. Then an open door underscores the availability of management through the informal organization. The more comfortable the employees feel about the availability of all levels of management the fewer grievances there will be.

The Importance of Attitude

The most important thing for management is its frame of mind. If managers think they are always right they will never be able to live with grievances. Some managers, and board members, suffer from the promotion neurosis mentioned earlier; that strange metamorphosis which takes place when a person is promoted from teacher to principal; principal to superintendent; or housewife, attorney, architect, or retired school teacher to Board Member. It does not happen to everyone but it does happen to too many. They are suddenly infallible. They know all the answers. They know more about what is good for people than the people do themselves. They solve problems by legislation, ordering crises out of existence by promulgating an administrative regulation or a board policy making them illegal. This is called the legislative mentality.

It is a special problem in New York State where the legislature truly believes in the divine right of kings and in legislative infallibility. That attitude percolates down through the various levels of government, even into school boards and school administrations. School officials must guard against it. To the extent that it exists, grievances will always present a problem for management.

An Opportunity Instead of a Threat

On the other hand, if management is perceptive, grievances can be an opportunity instead of a threat. The first opportunity is to admit the district is wrong.

If the employee is right, the district should pay up, and get on about its business.

The second opportunity, especially if everyone follows the practice of alerting the contract administrator or the superintendent at step 1, is one of anticipation and intervention. It establishes an early warning system that:

1) alerts management to potential problems at the earliest possible time before they become epidemic or seriously threaten the integrity of the contract;

2) alerts management to likely contract proposals the union may bring to the bargaining table at the next round of negotiations; and

3) also alerts management to problems in the contract which need to be corrected and which management ought to consider putting on the table.

By recognizing and capitalizing on the opportunities a grievance presents, a grievance can be a two edged sword, assuming that there was integrity in the original bargaining process, and that both parties fully intended to live with the agreement once they signed it.

The successful administration of a collective bargaining agreement is largely attitudinal. Grievances can be threatening to the management of the system, can be undermining of the authority of middle management, especially, can take away the perogatives of the board, and can tear the school system apart.

They can be all of these or they can be none of these. It depends on the attitudes of the people who are involved. If they are suspicious, mistrust each other, and do not really want to live with the agreement they made with each other, trouble is guaranteed. On the other hand, if the parties have professional respect for each other, trust each other as equals, and try to make the agreement work, then the grievance process, culminating in binding arbitration, is the best guarantee of peace, at least for the life of the agreement.